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Brief of Petitioners for Writ of Certiorari.

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# SUPREME COURT OF THE UNITED STATES.

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BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,

*Libellants and Petitioners,*

*against*

EDWARD E. O'BRIEN,

*Respondent.*

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**Brief in Support of Libellants' Petition for Writ of Certiorari.**

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BUTLER, STILLMAN & HUBBARD,

*Proctors for Petitioners.*

# Supreme Court of the United States.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,
*Libellants and Petitioners,*

AGAINST

EDWARD E. O'BRIEN,
*Respondent.*

## Brief in Support of the Petition of Libellants for a Writ of Certiorari.

This action was originally instituted in the District Court of the United States for the Southern District of New York by the libellants, composing the firm of Gibbs & Co., of Valparaiso, Chili, owners of a shipment of nitrate of soda, against the respondent as owner of the ship *Andrew Johnson*, to enforce contribution to general average expenses incurred in Callao, Peru, which had been paid by the libellants through a bottomry and respondentia bond affecting their cargo.

## Statement of Facts.

In June and July, 1884, the libellants shipped on board the *Andrew Johnson*, at Iquique Bay, 10,399 bags of nitrate of soda, and at Caleta Buena 9,544 bags of nitrate of soda, to be transported on said vessel to Hamburg, Germany, and there to be delivered to the order of Antony Gibbs & Sons, of London *(Exhibits 1, 2 and 3, fols. 85–91).*

On the 15th of July the ship sailed with all this cargo from her last loading port, Caleta Buena, for Hamburg, and soon thereafter met with heavy weather and with disaster, and necessarily sought a port of refuge *(Killeran, fol. 79).*

She went into Callao, and her condition was such that she could not prudently continue her voyage without repairs *(Answer, fol. 61; Killeran, fol. 79).*

A survey was held August 4th, by which it was found that certain butts and seams at the water's edge were very soft, and that water had entered in considerable quantities from the top sides, though she was making comparatively little water while lying in port. The surveyors recommended that she be lightened of cargo until her upper sheets of metal should be out of water for further examination *(First Survey, Ex. 4, fols. 93, 94).*

After the vessel had been lightened by the discharge of 900 tons of cargo she was further examined August 24th. The surveyors recommended that the top sides and water ways be horsed and caulked and the main decks caulked from foremast forward, the hood ends carefully overhauled, re-fastened where necessary and well caulked. They further recommended that at least 1,200 tons of the cargo be forwarded in another bottom, and reported that with the above repairs and thus lightened the *Andrew Johnson* could proceed on her voyage with safety. This they said they considered to be in the interest of both the owners of ship and cargo *(Second Survey, Ex. 5, fols. 97–100).*

The final survey was held September 10th, in which the surveyors reported that the repairs ordered by them had been well executed, the top sides had been horsed and caulked, the several hood ends re-fastened, the main deck forward re-caulked and two new bilge pumps supplied; that the cargo remaining on board had been well stowed and carefully distributed, and that the vessel was making no water *(Third Survey, Ex. 6, fols, 103, 104).*

The master of the *Andrew Johnson*, in accordance with the recommendations of the second survey, shipped 8,449 bags of his cargo, weighing about 1,130 tons, upon another vessel, the *Mary J. Leslie (Killeran, fols. 81, 82).*

The shipment was made in the name of J. H. Killeran as master, and the bill of lading bore the following endorsement signed by W. H. McLeod, master of the *Mary J. Leslie:*

"The 8,449 bags of nitrate of soda as per this bill of lading "are included in and jointly responsible with the nitrate of "soda specified in the bottomry and respondentia bond given "to Messrs. Grace Bros. & Co. as security for payment of the "American ship *Andrew Johnson's* disbursements in Callao."
*Exhibit 7, fol. 82; fols. 53–56.*

For the necessities incident to the port of refuge, the repairs of his vessel, the discharge, warehousing, reshipment and stowage of cargo, the master incurred serious expenses *(Amended Libel, fol. 31; Answer, fol. 61; Bond, fol. 43).*

The vouchers for these expenses have been proved and show an aggregate of 13,237.72 Peruvian soles, equivalent to £2,212, 5, 9 *(Vouchers, fols. 83, 84; Answer, fol. 61).*

In order to raise funds to meet these expenses the master made a bottomry bond in favor of Grace Brothers & Co., bearing date September 15th, 1884, for the amount of such advances with a bottomry premium of 17½ per cent., making an aggregate obligation of £2,599, 8, 9 *(Killeran, fols. 81–83; Bond, fols. 39–50)* or about $12,500. Grace Bros. & Co. appear to have been general agents for the respondent, though there is no proof that they advanced upon the bottomry bond as agents *(Exh. 3, fol. 88; O'Brien, fols. 109, 111).*

For the payment of the bond the master bound, obligated and hypothecated the *Andrew Johnson* and her cargo,, 'including that "portion of the cargo transshipped to the *Mary J. Leslie,*" and his freight *(Bond, fol. 45).*

The payment was conditioned that the vessel should set sail from Callao and proceed to Hamburg and pay the bond within five days after arrival at her final port of destination and "before commencing to discharge the cargo," free of any average, and with the provision that, if during the voyage there should be "*an utter loss*" of said vessel, the bond should be void, and otherwise be and remain in full force and virtue *(Bond, fols. 47–50).*

Thereupon the two vessels, the *Andrew Johnson* and the *Mary J. Leslie,* sailed from Callao for Hamburg carrying their respective lots of cargo.

The value of the *Andrew Johnson* was about $60,000, the value of her freight was $20,000, and the value of the cargo remaining on board of her about $50,000. The value of the cargo transshipped to the *Mary J. Leslie* was about $40,000.

The *Andrew Johnson* met collision with the British ship *Thirlmere* and was sunk in mid-ocean *(Killeran, fol. 84)*.

The *Mary J. Leslie* arrived in regular course at Hamburg on February 5th, 1885 *(Wirtz, fol. 143)*. Her cargo was to be received for the consignees by Hugo Wirtz, a broker residing in Hamburg *(Wirtz, fol. 142)*.

On the 10th of February formal demand was made upon Mr. Wirtz for the payment of the bond by Herman Stockfleth, notary, acting on behalf of Berenberg, Gossler & Co., bankers *(Stockfleth, fol. 141; Wirtz, fol. 144)*.

Berenberg, Gossler & Co. represented Baring Brothers & Co. of London, who were acting on behalf of the owners of the bond *(Sillem, fol. 121: Wirtz, fol. 144)*.

No cargo had up to the time of formal demand been discharged from the *Mary J. Leslie*, and by the terms of the bond and under the provisions of the German law it could not be discharged until the bond was paid or payment secured *(Bond, fol. 47; German Commercial Code, Section 695, fol. 179)*.

On the 11th of February, in order to secure the release of the cargo, Antony Gibbs & Sons gave the following obligation to Baring Brothers & Co.:

"In consideration of your telegraphing Messrs. J. Berenberg, Gossler & Co., Hamburg, to withdraw their claim on your behalf in respect of bottomry and respondentia on the cargo of nitrate of soda to our order arrived by the British vessel *Mary J. Leslie*, we hereby engage to pay to you whatever proportion of the said bottomry and respondentia bond may be found to be legally due from the said cargo, the question to be submitted to Messrs. Waltons, Bubb & Waltons and Messrs. William Richards & Son in London, or if it be found to be governed by Hamburg law, to equally competent authorities there to be appointed by your agents and ours" *(Sillem, fol. 121; Exhibit A, fols. 125, 126)*.

This engagement of Antony Gibbs & Sons was accepted the same day by Baring Brothers & Co., as follows:

"With reference to your letter of this date we understand your guaranty to be equally binding should the case be de-

" cided to be governed by Hamburg law, and shall accordingly " telegraph our friends in Hamburg to release the cargo of the " *Mary J. Leslie.*"

*Sillem, fols.* 121, 122 ; *Exhibit B, fol.* 127.

Thereupon the discharge of the cargo was commenced and was completed February 27th *(Wirtz, fol.* 146).

In order to determine the amount legally due to the bondholders from that portion of the cargo transported on the *Mary J. Leslie* Messrs. Berenberg, Gossler & Co. and Hugo Wirtz, representing respectively Baring Brothers & Co. and Antony Gibbs & Sons, appointed Dr. Wolffson and Dr. Stammann, " eminent and leading lawyers of Hamburg"; and these gentlemen decided that the cargo on board the *Mary J. Leslie* was liable to the extent of its value for the whole of the bond *(Sillem, fols. 123, 124 ; Wirtz, fol. 145).*

The value of that portion of the cargo was about $40,000, and therefore far in excess of the amount of the bond *(Wirtz, fol.* 146*).*

Dr. Stammann and Dr. Wolffson gave their opinion March 14th *(fols. 155–158),* as follows :

" Hamburg, 14 March, 1885.

" Hugo Wirtz, Esqre.
" Messrs. J. Berenberg, Gossler & Co.

" We formulate the question which you, in the names of " Messrs. Anthony Gibbs & Sons and Messrs. Baring Brothers " & Co. have submitted to our judgment, as follows :

" ' Whether the portion of the cargo of nitrate of soda of the " ' *Andrew Johnson* brought home per *Mary J. Leslie* is liable " ' for the whole amount of the Bottomry Bond which was " ' signed in Callao, and whether, consequently, the receiver of " ' this portion of the cargo has to pay the whole of the Bot- " ' tomry Bond, provided the value of this portion of the cargo " ' is not less than the amount of the Bottomry Debt ?

" This question we must answer in the affirmative, because " according to the law here, ship, freight and cargo of the " *Andrew Johnson*, as well as the portion of the cargo which " was transshipped into the *Mary J. Leslie* are jointly liable " for the whole amount raised on Bottomry at Callao, and, " therefore, the *Andrew Johnson* and her cargo having become " a total loss, the holder of the Bottomry Bond can come upon

" that portion of the cargo which was shipped by the *Mary J.*
" *Leslie* for the whole amount of his claim.

" Some doubt might be raised as to whether, according to
" the wording of the Bottomry Bond, the money was not lent,
" or appear to be lent contingent upon the safety of the *An-*
" *drew Johnson*, and becoming due only after her arrival at her
" port of destination ; but becoming null and void in the event
" of her non-arrival. We are of opinion, however, that this in-
" terpretation is not consistent with the real intention of the
" contracting parties, and that the wording referred to has
" originated in the not sufficiently careful use and employment
" of a form of Bond which happened to be at hand. This
" seems the less doubtful to us for this reason, that if the
" Bottomry Bond were interpreted in this manner the cargo of
" the *Mary J. Leslie* would be entirely liberated after the loss
" of the *Andrew Johnson* occurred, and would not even bear a
" portion of the Bottomry Debt, which, nevertheless, has
" arisen out of a case of General Average. Manifestly this
" cannot have been the intention of the parties interested.

" Yours truly,
" J. Otto Stammann,
" J. Wolffson."

The result was at once communicated to London, and on March 17th, 1885, Antony Gibbs & Sons paid to Baring Brothers & Co. the full sum of £2,592, 7, 9 *(Sillem, fol. 124)*.

Suit was brought by the owners of the *Andrew Johnson* against the owners of the *Thirlmere* in England to recover damages for the loss of his vessel by collision, valuing the vessel at $60,000 *(O'Brien, fol. 109)*. The owners of the *Thirlmere* limited their liability under the provisions of the British Act to £8–0 Sterling per ton, which resulted in a fund insufficient to pay all the losses in full. The result was that the owner of the *Andrew Johnson* received £5,179, 13, 6 on account of the loss of his ship and £858, 6, 11 on account of her freight *(O'Brien, fol. 114)*.

After the payment of the bond by the libellants in Hamburg they caused an adjustment to be made in London by William Richards & Sons, average adjusters, to show what portion of the expenses covered by the bond were properly chargeable against the owner of the *Andrew Johnson* either as general or special charges, and what portion against the owners of the cargo *(Richards, fols. 129, 130)*.

Then and in July, 1887, this action was instituted by the

libellants, claiming to recover from the owner of the *Andrew Johnson* the share of general and special charges properly falling upon the vessel, and which had been paid by the funds raised on bottomry.

In that libel it was alleged, though an error of the pleader, that the *Andrew Johnson* and her freight had become a total loss. Under exceptions filed to the sufficiency of the libel argument was had in April, 1888, and one of the exceptions was sustained *(Opinion, fols. 199–218)*.

Thereupon the libel was amended to set up the necessity of the repairs and to set up the bill of lading issued by the *Mary J. Leslie*. Upon the argument of these exceptions it was again held that a sufficient cause of action was not stated *(Record, fols. 6–8)*.

In January, 1889, the libel was further amended to allege that the funds had been supplied for the bottomry by the respondent *(Record, fol. 8)*. Again exceptions were filed, but before the same were brought on for argument the libellants again amended their libel to set up the fact, which had then just become known to the proctors, that the *Andrew Johnson* had not become a total loss at sea but had been sunk by the *Thirlmere*, and that the owner of the *Andrew Johnson* had recovered by legal proceedings against the *Thirlmere* in Great Britain the sum of £6,557, 9, 6 *(Record, fol. 10)*.

The libel as so amended is the one upon which the cause was tried in the District Court *(Amended libel, fol. 20–35)*.

The libellants, to maintain their cause of action, presented the depositions of the owner of the *Andrew Johnson (O'Brien, fols. 106–117)*, the master of the *Andrew Johnson (Killeran, fols. 76–84)* and witnesses in London and Hamburg *(Record, fols. 118–164)*.

The respondent called no witnesses in the District Court, but read one deposition of the master of the *Andrew Johnson* which had originally been taken by the libellants *(Killeran, fols. 196–198)*.

The libel was sustained upon the trial *(Opinion, fols 221–234)*, and it was ordered that the libellants "recover so much "of the moneys paid by them in satisfying the bottomry and "*respondentia* bond referred to in the libel as upon proper

"adjustment is properly chargeable to the owner of the ship "*Andrew Johnson* and her freight" *(Interlocutory Decree, fol.* 237*)*.

Reference was ordered to Special Commissioner to ascertain and compute such amount *(Interlocutory Decree, fol.* 237*)*. He found that the libellants were entitled to recover the principal sum of $6,091.73, for which sum, with interest and with costs a decree aggregating $9,598.94 was entered July 12th, 1894 *(Decree, fol.* 273*)*.

Upon appeal the United States Circuit Court of Appeals reversed the decree of the District Court and directed that the libel be dismissed upon the stated ground that the bottomry bond must be construed as falling due only upon the arrival of the *Andrew Johnson* in Hamburg, and that the *Andrew Johnson* must be deemed an "utter loss," although the circumstances attending her destruction gave to her owners a valuable right of recovery against the *Thirlmere*.

Without discussion of the other interesting questions which were submitted to Judges of the Circuit Court of Appeals, the petitioners urge that the grounds of the decision of that Court were erroneously taken and pray that a writ of *certiorari* issue directing the return of all the proceedings to this Court for review.

## POINTS.

### First.

THE BOND WAS ENFORCEABLE IN HAMBURG AGAINST THAT PORTION OF THE CARGO WHICH REACHED HAMBURG IN THE MARY J. LESLIE.

It is the general maritime principle that the lien of the bottomry bond attaches to and is enforceable against any salvage realized from the hypothecated property.

*Maclachlan on Shipping, 3d Ed., p. 61; 4th Ed., p. 63.*
*Force vs. Prov. Wash. Ins. Co., 35 F. R., 767, 771.*
*Ins. Co. vs. Gossler, 96 U. S., 645, 652, 653.*

*Appleton vs. Crowinshield, 3d Mass., 464; 8th Mass., 343.*
*The Empusa, Law Rep., 5th Prob. Div., 6.*

There can be no question but that the cargo arriving by the *Mary J. Leslie* was originally covered by the bond. The bond itself is explicit. The maker of the bond says:

"I bind myself, my heirs, executors or administrators, and "also the hull, boats, tackle, apparel and furniture of the said "vessel and her cargo of nitrate of soda, including about "twelve hundred tons of nitrate of soda, trans-shipped on board "the British bark *Mary J. Leslie*" *(Bond, fol. 40).*

The bond is later described as a

"present bond or obligation and hypothecation of the said "vessel, her boats and apparel, and her cargo, including that "portion of the cargo trans-shipped to the *Mary J. Leslie* and "the freight to be earned and become payable in respect of "the said voyage" *(Bond, fols. 44, 45).*

And, again:

"the said James H. Killeran doth by these presents mortgage, "hypothecate and charge the said vessels, her boats, tackle, "apparel and furniture, and her cargo, including that portion "of the cargo trans-shipped to the *Mary J. Leslie*, and the "freight to be earned and become payable in respect of the "said voyage" *(Bond, fol. 46).*

The bill of lading issued by the *Mary J. Leslie*, signed by her master, W. L. McLeod, recited that the cargo was shipped by J. H. Killeran, captain of the American ship *Andrew Johnson*, and bore this endorsement:

"The 8,449 bags of nitrate of soda as per this bill of lading, "are included in and jointly responsible with the nitrate of "soda specified in the Bottomry and Respondentia Bond given "to Messrs. Grace Bros. & Co. as security for the payment of "the American ship *Andrew Johnson's* disbursements in "Callao."

"Callao, 25th Sept, 1884.

"W. L. McLeod." *(Ex. B., fols. 53–56).*

It has been claimed, however, that the bond was made void by reason of the loss of the *Andrew Johnson.*

The provision was that the "obligation" should become void upon payment of the amount of the bond by the master of the *Andrew Johnson*.

"Or, if during the said voyage an *utter loss* of the said "vessel by fire, enemies, pirates, the perils of the sea or nav- "igation, or any other casualty, shall unavoidably happen to "be sufficiently proved by the said James H. Killeran" *(Bond, fol. 49)*.

We submit that the sinking of the *Andrew Johnson* by the *Thirlmere* at sea, and the consequent nonarrival of the *Andrew Johnson* in Hamburg, did not void the bond as against the cargo which arrived by the *Mary J. Leslie*.

**A.** Even if the *Andrew Johnson* had proved an "utter loss," the bond would not be forfeited thereby; for the words "said vessel" in the defeasance clause relate, clumsily perhaps, but clearly, to either the *Andrew Johnson* or the *Mary J. Leslie*.

The instrument should be construed liberally.

*Abbott on Shipping, 12th Ed., p. 112.*

**a.** The same words, "said vessel" are used earlier in the defeasance or condition clause in this connection:

"Now, the condition of this obligation is such, that if the "said vessel shall forthwith set sail from Callao aforesaid, and "without unnecessary delay or deviation proceed on her in- "tended voyage to Hamburg, and if the above bounden James "H. Killeran shall and do within the space of five days next "after the arrival of the vessel at her final port of destination, "and *before commencing to discharge the cargo* * * * well "and truly pay or cause to be paid, &c., &c., &c." *(Bond, fols. 46, 47)*.

Here the words "the said vessel" clearly relate to both the *Andrew Johnson* and the *Mary J. Leslie*, for it is apparent that it could not have been contemplated that, in the event of the arrival of the *Mary J. Leslie* in Hamburg earlier than the *Andrew Johnson*, she should lie in Hamburg "before com- "mencing to discharge the cargo" pending the possible arrival of the *Andrew Johnson*.

If "the said vessel," in the earlier part of the defeasance clause, refers to each of the two vessels, then it certainly must

carry the same meaning when next used in a later position in the same clause.

**b.** Only by such construction can due effect be given to the intention of the parties.

It was clearly the purpose of the parties to the bond that whatever got through to Hamburg, whether the *Andrew Johnson*, or whether the *Andrew Johnson's* cargo, or whether the *Mary J. Leslie's* cargo, should be held to pay the bond.

The *Andrew Johnson* herself was worth $60,000 *(O'Brien, fol. 109; Killeran, fol. 197).*

The major part of her cargo remained on board of her and was worth nearly $50,000.

It is apparent, therefore, that the *Andrew Johnson* and the cargo on board of her were amply sufficient to protect the bond, being nearly ten times the amount of the bond, if the parties had intended to limit their security to the one bottom of the *Andrew Johnson.*

Though the security was enormous in amount, the parties apparently were not content to rely upon one bottom, and therefore included the cargo of the *Mary J. Leslie*, which was worth about $40,000 *(Wirtz, fol. 146).*

If the *Andrew Johnson* and her cargo and freight had ever reached Hamburg, the security afforded by them was so ample that the bondholder would have no occasion to look to the cargo on the *Mary J. Leslie.*

We must assume, therefore, that the cargo on board the *Mary J. Leslie* was subjected to the bond in order that the bondholder would have security even though the *Andrew Johnson* and her remaining cargo did not reach destination.

**c.** The learned District Judge accordingly construed the bond as enforceable against the cargo arriving by the *Mary J. Leslie.* He did this at a time when the question came before him on exceptions to the libel, at which time it was supposed by him that the *Andrew Johnson* had become an "utter loss" *(Opinion, fols. 207–212).*

It is significant that, since the Court so interpreted the bond, both the master and the owner of the *Andrew Johnson* have been called as witnesses, and neither of them has sug-

gested that there was any intention to make the bond depend upon the arrival of the *Andrew Johnson* at Hamburg.

This question was passed upon, too, by the Hamburg counsel of the bondholders and of the cargo-owners, to whom the question of the liability of the *Mary J. Leslie's* cargo was submitted. They said:

"Some doubt might be raised as to whether, according to "the wording of the bottomry bond, the money was not lent "or appear to be lent contingent upon the safety of the "*Andrew Johnson*, and becoming due only after her arrival at "her port of destination, but becoming null and void in the "event of her non-arrival. We are of opinion, however, that "this interpretation is not consistent with the real intention "of the contracting parties, and that the wording referred to "has originated in the not sufficiently careful use and employ- "ment of a form of bond which happened to be at hand. This "seems the less doubtful to us for this reason, that if the "bottomry bond were interpreted in this manner, the cargo of "the *Mary J. Leslie* would be entirely liberated, after the loss "of the *Andrew Johnson* occurred, and would not even bear a "portion of the bottomry debt, which nevertheless has arisen "out of a case of general average. Manifestly this cannot "have been the intention of the parties interested (*Report*, "*fols. 157, 158*).

**B.** In fact, moreover, the *Andrew Johnson* did not become an "utter loss."

She went to the bottom of the sea as the result of the collision with the *Thirlmere*; but that fact did not render the owner's interest in her valueless, for the very circumstances which sent her to the bottom gave to him a claim for the value of his vessel and freight against the *Thirlmere*. For that value and to the limit of that value, if necessary, he must account to persons having claims against the vessel or against himself, based upon the events of the voyage.

We are well aware, of course, that the shipowner is not obliged to account for his insurance moneys; but the language of the Supreme Court, in relieving the owner from accounting for insurance, clearly indicates that he would have to account for moneys received by him, not upon an independent contract of insurance, but based upon the ownership of the vessel.

*City of Norwich, 118 U. S., 468, 493, 503, 504.*

The object of granting limitation of liability at all is to

enable merchants to invest money in ships without subjecting them to "an indefinite hazard of losing their whole property " by the negligence or misconduct of the master or crew; but " only subjecting them to the loss of their investment."

The Court held that if a merchant wanted to contract with an insurance company for indemnity against even the loss of his investment, he should be permitted to do so *(p. 504)*.

When a right of recovery exists, however, based not upon an independent contract of insurance, but upon the very loss itself by regular operation of law, because of ownership in the vessel, and not because of an independent contract, the case is different. Then a recovery is, in effect, the vessel or the freight which it represents; and such vessel and freight is not an " utter loss." The shipowner hazards nothing beyond " the loss of his investment."

The right of recovery which came to the owner of the *Andrew Johnson* by reason of the sinking of his vessel, was valuable. He presented it in the courts of Great Britain and received £5179-13-6 on account of his freight vessel, and £858-6-11 on account of his freight *(O'Brien, fol. 114)*. He did not recover full payment only because the *Thirlmere* was insufficient in value to pay all losses, and, under the operation of the British statutes for limitation of liability, paid only a dividend.

**C.** The payment by the libellants of the bond was substantially a forced payment.

The *Mary J. Leslie* arrived in Hamburg, February 5th. The nitrate of soda had been shipped in the name of the master of the *Andrew Johnson* and subject to the terms and conditions of the *Andrew Johnson's* original charter party, as and be- " ing included in and jointly responsible with the nitrate of soda " specified in the Bottomry and Respondentia Bond given to " Messrs. Grace Bros. & Company as security for the payment " of the *Andrew Johnson's* disbursements in Callao. *(Bill of Lading, Ex. 7)*.

By the terms of the bond it fell due February 10th, five days after arrival in Hamburg, and on that date formal demand was made by a notary *(Stockfleth, fol. 141)*.

No discharge of the cargo was made meantime, nor was any permitted until after arrangements had been affected between

Antony Gibbs & Sons and Baring Brothers & Company to secure the payment of the bond.

On the 11th of February, in order to secure the release of the cargo Antony Gibbs & Sons gave a formal written engagement to Baring Brothers & Company to pay "whatever pro-"portion of the said Bottomry and Respondentia Bond may "be found to be legally due from the said cargo" *(Sillem, fol. 121, Exh. A, fols. 125, 126)*. This engagement having been accepted by Baring Brothers & Company, the discharge began *(Wirtz, fols. 144, 145)*.

Immediate steps were taken to ascertain the law, and it was under the advice of eminent lawyers representing each party that the amount of the bond was paid *(Wirtz, fol. 145; Wolffson, fols. 151, 152, 155-158; Stammann, fols. 162, 163)*.

## Second.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE LOSS OF THE ANDREW JOHNSON DEFEATED THE BOND AND DEPRIVED THE BONDHOLDER OF ALL RIGHT OF SALVAGE.

Significance should attach to the use of the word "utter." It is a word of extreme meaning and conveys to the mind a different idea than does the word "total."

It is common to hear of total losses in insurance law; but the phrase has grown to have such a limited meaning that now, when it is the intention of parties to condition the insurance upon the complete destruction of the property insured, it is necessary to use the words "absolute total loss."

In construing this bond it must be assumed that the parties used the words "utter loss" advisedly, as meaning a more complete disappearance of the pledged property than would be signified even by the words "total loss." The *Andrew Johnson* was not an utter loss, inasmuch as there remained to her owner a valuable right of action against the *Thirlmere*.

The condition of the bond is not, as was apparently assumed by the Circuit Court of Appeals, that the *Andrew Johnson*

should arrive in Hamburg; but the condition is that if there should be "an utter loss" then the bond should become void.

Assume for the moment that the words relate strictly to the *Andrew Johnson* and not to any other property pledged. They even in that case convey the right of the bondholder to all salvage. The cargo arriving on the *Mary J. Leslie* would rank as salvage.

It is not necessary to express a salvage clause in a bond in order to give to the bondholder the benefit of salvage.

"If the ship ceases to be a ship by reason of unavoidable "sea perils, the bondholders' lien attaches to the salvage, if "there be any."

*Maclachlan on Merchant's Shipping, 4th Ed., p. 63.*
*Force vs. Prov. & Wash. Ins. Co., 35 Fed. Rep., 767, 771.*

"If the ship was once bottomried, the bond attached to "the very last plank, and the holder might have that sold for "his benefit."

*The Catherine, 15 Jurist, 231, 232.*

The true meaning of the defeasance clause is that, in the event of the property being damaged or in part destroyed by sea perils, the bondholder's rights are limited to the value of such property as may be saved, and that he has no remedy against the master or owner of the vessel personally for the stipulated amount of the bond, a right which he would have if the property had been destroyed or diverted by the deliberate intention of the master or owner.

*The Catherine, supra.*

It must have been contemplated by the parties that their respective rights would be determined by the law of Hamburg, at which place payment of the bond was stipulated to be made.

By the German Commercial Code it is provided that:

"All the bottomry objects are jointly and severally liable "to the bottomry creditor."

*Article 692, Record, fol. 177.*

And again:

"In case the bottomried objects become, by reason of gen- "eral or particular average, insufficient for the payment of the "bottomry creditor, he shall bear the loss thereby caused."

*Article 691, Record, fol. 177.*

The German law, in thus specifically providing that in the event of the partial destruction of the bottomried objects the lender shall be limited to the property surviving, just as clearly establishes by implication that the bottomry lender is entitled to look for relief to the property surviving.

The fact that the vessel does not, through sea perils, reach her port of destination, merely relieves the master and ship owner from the measure of personal responsibility that would attach to them if her non-arrival was due to their voluntary action.

*The Great Pacific L. R., 2 Adm. & Ecc., 381.*
*The Catherine, 15 Jurist, 231.*
*The Draco, 2 Sumner, 157.*

## Third.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS WITHOUT PRECEDENT TO SUSTAIN IT.

The learned Judges say:

"No doubt damages recovered for the tortious act of a "colliding vessel are often treated in admiralty as a substitute "for the destroyed vessel. But the hazard taken by the "bottomry bondholder is the physical survival of the ship, or "at most of any salvage from her. When she goes to the "bottom with all she holds, there is an utter loss within the "meaning of the contract of bottomry, and the bond goes down "with the vessel."

We submit that, it being the practice of the Courts of Admiralty to treat damages recovered for the tortious act of a colliding vessel as a substitute for the destroyed vessel, such damages or right to damages constitutes salvage.

No authority is cited to show that such a loss is an "utter loss" within the meaning of a contract of bottomry, and such a doctrine is certainly inconsistent with the doctrine that the damages may be taken to represent the destroyed vessel.

Even if the damages so recoverable are not a *res* that can be proceeded against by the bondholder, still the fact of the

existence of the right to such damages relieves the situation from being one of "utter loss," and prevents the bond becoming void.

If there is not an "utter loss," then the bond is not rendered void, and is certainly operative upon all surviving pledged property.

*German Commercial Code, Arts. 691, 692.*
*Record, fol. 177.*

It should be borne in mind that this action is not one for the enforcement of the bond, but that it is an action brought by the owner of cargo, who has upon demand and under the advice of eminent counsel paid the entire bond in the belief that he was legally bound to make such payment, to enforce contribution from the shipowner for his proportionate share of the expenses for which the bond was given.

The only question is whether the bond was enforceable or whether it was void as against the cargo arriving in Hamburg on the *Mary J. Leslie*, either as salvage or otherwise.

## Fourth.

THE BOND, BEING VALID AS AGAINST THE CARGO, AND ENFORCEABLE AGAINST THAT PORTION OF THE CARGO ARRIVING IN HAMBURG ON THE MARY J. LESLIE, THE LIBELLANTS, HAVING PAID THE BOND, ARE ENTITLED TO RECOVER FROM THE SHIP-OWNER HIS PROPORTION OF THE EXPENSES INCURRED AT CALLAO.

The expenses at Callao grew out of the distress into which the *Andrew Johnson* fell at sea. Some of them were properly chargeable upon the ship alone, some upon the ship-owner alone, some upon the cargo alone, and some upon all interests.

They might have been paid at the time by the respective parties or by either of the parties; but, in accordance with custom, it is usual to make the assessment or distribution or contribution at the end of the voyage.

If the ship owner had paid the expenses at Callao, or if he had taken up the bond at Hamburg, he would have reimbursed

himself through a statement and adjustment of general average for such portion of the expenses as was properly chargeable upon the cargo, taking from the cargo on discharge a general average bond.

The owner neither paid the expenses at Callao, nor did he take up the bond; but left payment upon the bond to be enforced from the owner of the cargo.

The owner of the cargo having paid all charges is legally entitled to contribution upon a proper statement and adjustment.

*Benson vs. Duncan, 1 Exch., 537; 3 Exch., 644.*
*Appleton vs. Crowninshield, 8 Mass., 340, 360.*

The principle was fully recognized by Chief-Justice TANEY, though in the case then under consideration he relieved the ship owner from further payment, upon the ground of limitation of the ship owner's liability, the vessel in that case having been already exhausted by the bond.

*Naylor vs. Baltzell, Taney's Decisions, 55.*

The owner of the *Andrew Johnson*, however, did not lose his vessel. Aside from the reimbursement through insurance, with which we have nothing to do, he received from the proceeds of the *Thirlmere*, on account of his vessel, £5,178-13-6, and on account of her freight £858-6-11 *(O'Brien, fol. 144)*. These figures represent "the amount or value of the interest "of such owner in such vessel, and her freight then pending," which is established by statute to be the limitation of the shipowner's liability.

*U. S. Revised Statutes, Sec. 4283.*

Every equity is with the libellants.

By the exigencies of the voyage they have been forced to pay the expenses which should have been paid by the shipowner—expenses which, in fact, repaired and preserved the shipowner's property and gave to it at least some part of the value for which compensation was made to him by the *Thirlmere*.

## Fifth.

IT IS A MATTER OF GREAT COMMERCIAL INTEREST THAT THIS COURT SHOULD DECLARE THE MEASURE OF A SHIPOWNER'S LIABILITY WHEN THE DESTRUCTION OF HIS VESSEL HAS OCCURRED UNDER SUCH CIRCUMSTANCES AS TO CREATE A VALUABLE RIGHT OF RECOVERY AGAINST A WRONGDOER.

This question has never been passed upon by this Court. The question nearest to it is the discussion of the Court in the case of *The City of Norwich, 118 U. S., 468, 493, 503, 504.*

In that case it was determined that a shipowner cannot be called upon after the loss of his vessel to surrender the insurance moneys received by him by virtue of independent contracts of insurance, in order to secure the relief of limitation of liability.

The decision was based specifically upon the fact that contracts of insurance were independently made by the shipowner and had nothing to do with the engagements made or the liabilities incurred by him in respect to the voyage.

The implication is strong from the reasoning of the Court that he would be compelled, however, to account for the value of the right coming to him, not by virtue of any independent contract, but solely by reason of his ownership in the vessel.

Certainly, if this is so, the *Andrew Johnson* was not an "utter loss" within the meaning of the bottomry bond.

Just as the decision in the case of the *City of Norwich* settled forever the questions that disturbed ship owners respecting the status of insurance moneys, so will a decision of this Court in this case settle a question fully as important.

The decree of the District Court, including interest to this date, exceeds $10,000, and therefore important property rights, as well as novel questions of law, are involved.

**Sixth.**

A WRIT OF CERTIORARI SHOULD BE GRANTED, DIRECTED TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, COMMANDING THEM FORTHWITH TO CERTIFY AND RETURN TO THIS COURT ALL OF THE PROCEEDINGS BY THEM HAD IN THIS ACTION.

BUTLER, STILLMAN & HUBBARD,
*Proctors for Petitioners.*

WILHELMUS MYNDERSE,
*Advocate.*